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Jan Graham; David B. Thompson; Attorney for Appellee.

Robert K. Heineman; L. Clark Donaldson; Attorney for Appellant.

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DOCKET NO. 920591-CA
IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 920591-CA
v.	:	
CORY M. DAVISON,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE
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APPEAL FROM A CONVICTION OF UNLAWFUL
DISTRIBUTION OF A CONTROLLED SUBSTANCE, A
SECOND DEGREE FELONY, IN THE THIRD JUDICIAL
DISTRICT COURT, IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE LESLIE A. LEWIS,
PRESIDING

JAN GRAHAM (1231)
Attorney General
DAVID B. THOMPSON (4159)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Appellee

ROBERT K. HEINEMAN
L. CLARK DONALDSON
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

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Mary T. Noonan
Clerk of the Court

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Attorney General
DAVID B. THOMPSON (4159)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Appellee

ROBERT K. HEINEMAN
L. CLARK DONALDSON
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

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IN THE UTAH COURT OF APPEALS

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of unlawful distribution of a controlled substance, a second degree felony, under Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1992).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992).

STATEMENT OF ISSUES PRESENTED ON APPEAL

AND STANDARDS OF APPELLATE REVIEW

The issue presented in this appeal is whether defendant has preserved his prosecutorial misconduct claim for review.

A defendant's failure to object to the prosecutor's closing argument in the trial court generally precludes appellate review of alleged prosecutorial misconduct. State v. Johnson, 774 P.2d 1141, 1147 (Utah 1989).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes, or rules pertinent to the resolution of the issue presented for review is contained in the body of this brief.

STATEMENT OF THE CASE

The State charged defendant with unlawful distribution of a controlled substance, a second degree felony, under Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1992) (R. 6-7).

A jury found defendant guilty as charged (R. 137). The trial court sentenced defendant to the Utah State Prison for a term of one to fifteen years and fined him \$10,000, but stayed execution of the prison sentence and the fine and placed him on three years' probation (R. 138-39).

STATEMENT OF FACTS

Given the issue presented on appeal, a statement of facts beyond that which appears in the Statement of the Case is not necessary.

SUMMARY OF ARGUMENT

Having consciously and strategically decided not to object below to perceived prosecutorial misconduct in closing argument, defendant cannot assert plain error on appeal. His decision not to object amounts to invited error which precludes review of the prosecutorial misconduct claim. It is settled law that when invited error butts up against plain error, the invited error doctrine prevails.

Therefore, this Court should not consider defendant's claim of error, and his conviction should be affirmed.

ARGUMENT

DEFENDANT'S CONSCIOUS, STRATEGIC CHOICE NOT TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT PRECLUDES APPELLATE REVIEW OF ALLEGED PROSECUTORIAL MISCONDUCT

Defendant claims that the prosecutor's closing argument misstated the evidence and erroneously implied to the jury that defendant had the burden to prove who actually sold drugs to the undercover officer. He argues that this amounted to prosecutorial misconduct which warrants reversal of his conviction.

Defendant acknowledges that he did not object to the prosecutor's closing argument in the trial court, implying that he made a conscious, strategic choice not to object below. He asks this Court to reverse under the plain error doctrine.

Defendant's plain error argument fails. A defendant's failure to object to the prosecutor's closing argument at trial generally precludes appellate review of alleged prosecutorial misconduct. State v. Johnson, 774 P.2d 1141, 1147 (Utah 1989). See also State v. Seel, 827 P.2d 954, 962 (Utah App.)

("defendants' failure to object to the prosecutor's comments or ask for a curative instruction at trial waived defendants' right to appeal [the prosecutorial misconduct] issue"), cert. denied, 836 P.2d 1383 (Utah 1992). Furthermore, when trial counsel makes a conscious, strategic choice not to object to the prosecutor's closing argument, the issue of prosecutorial misconduct cannot then be raised for the first time on appeal. See State v. Bullock, 791 P.2d 155, 158-59 (Utah 1989), cert. denied, 497 U.S. 1024 (1990). "To hold otherwise would foster invited error."

Johnson, 774 P.2d at 1147.

Here, defendant, having consciously and strategically decided not to object to perceived prosecutorial misconduct in the trial court, where the error could have been corrected, cannot now assert the claim for the first time on appeal under the guise of plain error. This is invited error, and "where invited error butts up against [plain error], the invited error rule prevails." State v. Perdue, 813 P.2d 1201, 1202-06 (Utah App. 1991).¹

Defendant's suggestion that "Utah should adopt a rule whereby plain error will be reviewed on appeal despite a conscious tactical decision not to object on the part of defense counsel," is both contrary to controlling precedent and unwarranted. His theory is that in many cases an objection to allegedly improper closing argument is ordinarily not sustained "except in the most egregious cases" and "is likely to exaggerate the harm done by the prosecutor's misconduct." Br. of Appellant at 15. These facts, he maintains, should relieve a defendant of the obligation to make an objection, because an objection only "serve[s] to preserve an issue for appeal, [and] it does not make sense for [defense] counsel to jeopardize his or her best chance for acquittal merely to preserve the right to appeal." Id. at 16.

¹ An exception to the principle enunciated in Perdue is recognized where the "invited error" is due to ineffective assistance of counsel. Bullock, 791 P.2d at 158-59. However, defendant does not argue that trial counsel's failure to object to the prosecutor's comments constituted ineffective assistance of counsel.

While defendant raises valid concerns about the negative effect an objection could have on the jury, his proposed rule guts the reasoned principle that the trial court should be given the first opportunity to correct an error. See State v. Eldredge, 773 P.2d 29, 36 (Utah) (the principle underlying the contemporaneous objection rule "is that in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it"), cert. denied, 493 U.S. 814 (1989).

Moreover, defense counsel need not make an objection in front of the jury; counsel can request a side bar conference with the judge and enter an objection there, or if the prosecutorial misconduct is egregious such that a motion for a mistrial is deemed appropriate (see State v. Tillman, 750 P.2d 546, 561 (Utah 1987) (noting that defendant had failed to make a motion for mistrial based on prosecutor's improper argument to jury)), counsel can ask that the jury be excused for presentation of such a motion to the judge. See State v. Lesley, 672 P.2d 79, 82 (Utah 1983) (procedural steps to ensure that counsel's objections are heard outside the presence of the jury "are commonly undertaken in civil and criminal trials").

In sum, defendant's strategic choice not to object to perceived prosecutorial misconduct precludes appellate review of his challenge to the prosecutor's comments.

CONCLUSION

Based on the foregoing argument, this Court should affirm defendant's conviction.

RESPECTFULLY submitted this 1 day of February, 1993.

JAN GRAHAM
Attorney General

David B. Thompson
DAVID B. THOMPSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Robert K. Heineman and L. Clark Donaldson, Salt Lake Legal Defender Assoc., Attorneys for Appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 1 day of February, 1993.

David B. Thompson